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No. 73-822

In the
Supreme Court of the United States
OCTOBER TERM, 1973

ERNEST FRY and THELMA BOEHM, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY
COURT OF APPEALS

OPINION BELOW

The Temporary Emergency Court of Appeals rendered a judgment on October 25, 1973. The opinion of the court is reported at 487 F.2d 936 (Em.App. 1973) and a copy thereof is attached to the Petition for Writ of Certiorari as Appendix A.

JURISDICTION

The jurisdiction of the Supreme Court is conferred by Section 211(g) of the Economic Stabilization Act, as amended, 12 U.S.C. § 1904 (Supp. II, 1972).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved are Article I, Section 8, Clause 3, which provides as follows:

> The Congress shall have Power . . . To regulate commerce . . . among the several States;"

and the Tenth Amendment which provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The statutory provisions involved are Sections 202, 203(a)(1), (b) and (h) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 (Supp. II, 1972), the texts of which are contained in Appendix A, attached hereto.

QUESTIONS PRESENTED

1. Whether the Tenth Amendment to the United States Constitution precludes congressional regulation of salaries paid to employees of sovereign States of the Union.

A. Whether Tenth Amendment principles limit congressional power under the Commerce Clause to regulate and control governmental activities of the States.

B. Whether Congress clearly manifested its intent to subject salaries paid state employees to the powers of the Economic Stabilization Act of 1970.

C. Whether congressional delegation of power to control state salaries to the Executive Branch was proper.

D. Whether there was a rational basis for federal regulation of state employees' salaries in view of the principles of the Tenth Amendment.

INTEREST OF AMICUS CURIAE

Amicus Curiae California State Employees' Association is an employee organization of in excess of 100,000 members consisting of civil service employees of the State of California, and employees of the University of California and State College and University systems. The issues involved in this case directly affect California State Employees' Association and its members in that pay increases enacted into law by the California Legislature and concurred in by the Governor have been withheld by virtue of an order of the Cost of Living Council purportedly issued pursuant to the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 (Supp. II, 1972). Amicus Curiae California State Employees' Association was a party plaintiff in a case recently decided by the California Supreme Court (James Coan and California State Employees' Association v. State of California, et al., California Supreme Court No. SAC 7987), and in a case currently pending in United States District Court, Eastern District of California, Northern Division (State of California and California State Employees' Association v. United States of America, et al., No. Civ S74-27). Both cases deal with questions similar to those involved in this instant proceeding.

Amicus Curiae California State Employees' Association has obtained the written consent of the parties to this action, which consents are filed

herewith. Copies of the written consents are attached hereto as Appendix B.

Amicus Curiae California State Employees' Association files this brief in support of the position of the Petitioners, Ernest Fry and Thelma Boehm.

SUMMARY OF ARGUMENT

The principles of federalism inherent in the Tenth Amendment to the United States Constitution reserve to the States the power to regulate and control salaries paid employees of the States, and hence preclude such regulation by Congress. The Commerce power does not reach those activities sought to be controlled here - the regulation of state employees' salaries - since the Commerce power, like the tax power, does not reach those activities which are unique to a State and essential to its preservation.

In enacting the Economic Stabilization Act of 1970, Congress did not clearly manifest its intent to make the States subject to the salary control portions of that legislation. Since the case law establishes that congressional intent to regulate the internal affairs of the States will not lightly be inferred, Congress cannot be deemed to have undertaken the exercise of this power which has traditionally been exercised by the States.

Assuming both congressional power to regulate state salaries, and Congress' intent to do act, the subject act contravenes the conditional doctrine of Separation of Powers by reason of the unguided delegation of power to the Executive Branch. Since the purported delegation of power to the Executive Branch to regulate and control salaries did not contain quidelines to sufficiently mark the field with regard to public sector regulation, the federal action is invalid.

Congress had no rational basis to regulate the salaries paid by States to their employees, and

hence congressional action violates both the Due Process Clause of the Fifth Amendment and the provisions of the Tenth Amendment. In this case the Federal Government has attempted to usurp the role as arbiter of a sovereign State's relations with its employees without a rational basis to justify such action. Salary setting in the public sector differs substantially from such action in the private sector. The public sector, including the State of Ohio, is concerned primarily with paying prevailing wages, i.e., establishing salaries on the basis of the amounts being paid in other sectors of the economy. For this reason, the noncollective bargaining public sector is a follower, and not a leader, with regard to wage scales. Control of the private sector leads automatically to control of the public sector. Establishing controls over noncollective bargaining States has the effect of regulating the States twice.

ARGUMENT

THE PRINCIPLES INHERENT IN THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PRECLUDE CONGRESSIONAL REGULATION OF SALARIES PAID TO EMPLOYEES OF SOVEREIGN STATES OF THE UNION

A. CONGRESSIONAL POWER TO REGULATE AND CONTROL GOVERNMENTAL ACTIVITIES OF THE STATES UNDER THE COMMERCE POWER (U.S. CONST., ARTICLE I, SECTION 8, CLAUSE 3) IS LIMITED BY THE PRINCIPLES INHERENT IN OUR SYSTEM OF FEDERALISM EXEMPLIFIED BY THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The central, overriding issue presented by this case is whether the United States Congress has the authority under its Commerce power to regulate the internal governmental affairs of a sovereign State. It is recognized that congressional power under the Commerce Clause is broad indeed; however, the power is not without limitations. Although this Court has not specifically defined the line which separates a valid exercise of the Commerce power from an unconstitutional usurpation of state governmental functions, it must be assumed that such a line exists and is capable of definition. In fact, this Court has acknowledged that congressional power under the Commerce Clause does have limits, but determined that the limitation had not yet been reached by the case under consideration. *E.g.*, *Maryland* v. *Wirtz*, 392 U.S. 183, 196 (1968). Without such a border, there would be no need for the separate fifty State governments, for Congress could conceivably take over all their functions acting under an unchecked Commerce power. Indeed, as the *Wirtz* Court recognized, "[t]he Court has ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity.'" 392 U.S. at 196. This case calls upon the Court to exercise that power and define the limits of the Commerce Clause. It is submitted that an appropriate limitation on the exercise of the Commerce power with respect to state activities would preclude federal regulation of those activities which are unique to a State and are essential to its preservation as a viable political sovereign.

The purported application to the States of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 (Supp. II, 1972), upheld by the Court below, constitutes an unwarranted invasion by the Federal Government of sovereign governmental activities which are unique to States and essential to their preservation, and as such destroys the constitutional principle of federalism. Such action cannot be justified by congressional power to regulate commerce, especially in view of the existence of the Tenth Amendment.

The Tenth Amendment to the United States Constitution provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Since the power to regulate and control the internal governmental affairs of sovereign States by dictating a ceiling on salaries that can be paid public officials and employees is not delegated to the United States by the Constitution, nor can it be implied in the Commerce Clause, such power is reserved to the States.1/

1/ This Court has held that a State's powers with respect to its officers and employees is absolute, except as restrained by provisions of the State's own constitution. A State may, at its sole discretion, add officers, abolish them, increase or lower the salary, or change the mode of compensation. Newton v. Commissioners, 100 U.S. 548, 559 (1880). This Court has also held that it is essential to the independence of the States that such powers be exclusive and free from external interference, except as plainly provided to the contrary by the United States Constitution. Taylor v. Beckham, 178 U.S. 548, 570-71 (1900). An

The Commerce Clause reaches three main categories of commercial activities: (1) the use of the channels of interstate commerce, (2) protection of the instrumentalities of interstate commerce or persons or things in commerce, and (3) those activities affecting commerce. Perez v. United States, 402 U.S. 146, 150 (1971). The third category has been applied to extend the reach of the Commerce power to those intrastate activities which so affect interstate commerce as to make their regulation appropriate. Perez v. United States, supra, 402 U.S. 150; Atlanta Motel v. United States, 379 U.S. 241, 258 (1964). No case has interpreted the Commerce Clause to permit the Federal Government to supersede the governmental activities of sovereign States in their local spheres. No decision has gone as far as the decision of the Court below in this proceeding, the effect of which comes dangerously close to, if not actually permitting "the Congress [to] virtually draw up each State's budget to avoid' disruptive effect[s] . . . on commercial intercourse.' Atlanta Motel v. United States, 379 U.S. 241." Maryland v. Wirtz, supra, 392 U.S. 183, 205 (Mr. Justice Douglas, Dissenting).

The decision of the Temporary Emergency Court of Appeals (United States v. Ohio, 487 F.2d 936, 941 (Em.App. 1973), and the argument of the Respondent United States in this Court, rest primarily upon

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1/ Cont'd
important factor in the United States Supreme Court's determination of a State statute's constitutionality is whether such legislation involves the right and power of the State to select its own agents and officers. Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552, 557 (1947). See also Ziffrin v. Reeves, 308 U.S. 132 (1939); South Carolina v. United States, 199 U.S. 437 (1905).

this Court's opinion in Maryland v. Wirtz, supra, 392 U.S. 183. Wirtz upheld the constitutionality of the 1961 and 1966 amendments to the Fair Labor Standards Act which extended the coverage of the minimum wage and overtime provisions to schools and hospitals, whether public or private, profit or nonprofit, and modified the definition of "employer" to remove the exemption of the States and their political subdivisions with respect to certain employees of hospitals, institutions, and schools.2/ This Court acknowledged that the Commerce power has limits (392 U.S. 196), but found that such limits had not been exceeded. In holding that United States v. California, 297 U.S. 175 (1936), was dispositive of the issue, the Wirtz Court stated the following:

> If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulations.

Both the United States Congress, in enacting the amendments to the Fair Labor Standards Act, and the United States Supreme Court, in upholding their constitutionality in Wirtz, quite plainly recognized that the activities that they were concerned with were those which were engaged in by both private persons and state and local governments. Both commonly operate hospitals and

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2/ Congress has recently amended the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., by greatly expanding the coverage of state employees. P.L. 93-259. The constitutionality of these recent amendments cannot be deemed to be a certainty on the basis of Maryland v. Wirtz, since Wirtz dealt only with a narrow set of amendments applicable in limited circumstances.

similar institutions and both establish and operate schools. The High Court did not, as both the Temporary Emergency Court of Appeals and the Respondent United States seem to lose sight of, hold that those activities which are engaged in only by States in the exercise of their sovereign governmental duties may be reached by the federal Commerce power.

One limitation that this Court has consistently held to apply to the exercise of congressional power vis a vis States is that such regulations may not reach those activities which are unique to State governments.

> There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. New York v. United States, 326 U.S. 572, 582 (1946) (Opinion of Mr. Justice Frankfurter).

The distinction to be drawn is between "the State as [a] government and the State as [a] trader." New York v. United States, supra, at 579.

Although the New York case concerned the taxing power rather than the Commerce power, it is submitted that the reasoning remains the same and the example serves as an appropriate analogy to the instant situation. The Economic Stabilization Act has been applied to all aspects of State activities, including those which are only engaged in by a State. Just as only a State can own a Statehouse, only a State employs

Governor, members of the Legislature, Judges, Highway Patrol officers, Department of Motor Vehicle employees, Unemployment Insurance employees, and generally operates a State government. Since the United States Congress cannot unduly interfere with a State's discharge of its sovereign governmental functions by levying a property tax on a Statehouse, the Congress cannot constitutionally impose limitations on the salaries a State can pay its officers and employees.

Such regulations adversely affect a State in discharging its governmental obligations and duties to her citizens. Because of salary limitations imposed, Judges may very well decide to enter the private practice of law, where limitations on income are not imposed. Highway Patrolmen and State Troopers may leave their positions for more lucrative positions in the private sector.3/ Application of such a regulation to the States adversely affects a State's ability to recruit and retain key employees. Hence, the impact of a "wage ceiling" is quite different from the problems dealt with in Wirtz. The Economic Stabilization Act affects virtually every employee and officer of the State, while the Wirtz case concerns only those employed in schools and hospitals, and even then did not cover those employed in executive, professional, supervisorial or administrative capacities. It is difficult to follow the reasoning of the Temporary Emergency Court of Appeals in determining that the "impact of the extension of the Fair Labor Standards Act to the States appears to be greater than the impact of

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3/ "If State salaries are significantly below prevailing rates, the State cannot recruit and retain a competent work force." California State Personnel Board, Standards and Survey Division, Salary Setting in California State Civil Service (1969), page 5.

the [Economic Stabilization] Act . . . ." (487 F.2d at 942.) The Court apparently reached this conclusion persuaded by the fact that the provisions of the Act are temporary.4/ Such an observation is, of course, clearly irrelevant. The fact that action taken by the United States Congress is temporary in character does not change an otherwise unconstitutional statute into a constitutional one. Furthermore, "[e]xtraordinary conditions do not create or enlarge constitutional power. . . ." A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528 (1935).

A State's sovereignty essential to its proper functioning under the United States Constitution cannot be taken away by any form of legislation. Ashton v. Cameron County District, 298 U.S. 513, 531 (1936).

> If obligations of States or their political subdivisions may be subjected to interference here attempted, they are no longer free to manage their own affairs; the will of Congress prevails over them; although inhibited, the right to tax might be less sinister. And really the sovereignty of the State, so often declared necessary to the federal system, does not exist. McCulloch v. Maryland, 4 Wheat. 316, 430. Farmers & Mechanics Bank v. Minnesota, 232 U.S. 516, 526.
> Ashton v. Cameron County District, supra, at 531.

4/ As they indeed were. The Economic Stabilization Act, and its attendant regulations, expired on April 30, 1974. Economic Stabilization Act Amendments of 1973, P.L. 93-28, § 8; 87 Stat. 27, 29 (1973).

If the imposition of wage ceilings imposed upon state governments by Congress under the guise of its power to regulate commerce is upheld, the death knell of States as viable political sovereigns will be sounded.

> . . . [I]f all employees of the state - including those occupying purely governmental positions created by the state, paid with funds raised by the state, performing services entirely intrastate in character - are subject to whimsical control of the Congress and federal administrative agencies, "then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment." (Douglas, J., dissenting in Maryland v. Wirtz, 392 U.S. at 205).
> Coan v. California, ___ Cal.3d ___ (California Supreme Court, No. SAC 7987, decided April 19, 1974)(Mosk, J., Concurring, page 2 of Justice Mosk's opinion).5/

If this regulation is a constitutional exercise of congressional power under the Commerce Clause, then the Federal Government can impose limitations on the amount of revenue which can be raised by the States through their taxing power, can limit the amount of money spent on Statehouse

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5/ The slip opinion of this case, in which Amicus Curiae California State Employees' Association obtained a writ of mandamus ordering the State of California and its officials to pay the salary increases for state employees as provided by state law, is attached as an appendix to the brief of Amicus Curiae State of California.

grounds, can limit the number of employees hired by a State, can limit the total amount of money appropriated and spent by the State, and can "virtually draw up each State's budget." The Commerce power simply does not go this far. This case presents the situation where the limits of the Commerce power have finally been reached and exceeded.

> If we examine application of this federal act in the light of the commerce clause, we would at once experience the utter futility of trying to detect activity in interstate commerce by a janitor in the State Capitol, a stenographer in the Governor's office, an administrative assistant to a state legislator, a law clerk in this court, or, for that matter, by every state employee who is hired by the state, paid by the state and whose sphere of service is jurisdictionally circumscribed by the borders of the state. Thus this could be a classic case in which to take a firm constitutional stand for state independence in its governmental function, however anachronistic such action may seem to those who over the years have bent constitutional principles to fleeting expediency.
> Coan v. California, supra, ___ Cal.3d ___ (Mosk, J., Concurring, page 5 of Justice Mosk's opinion).

The cases establishing State immunity from federal taxation decided by this Court are an important reservoir of legal principles applicable to federal-state relations and hence should be examined in reaching a decision in the instant proceeding. The "State taxing" cases nearly uniformly hold that the federal taxing power extends to the States so long as the Congress does not discriminate by the imposition of taxes upon state property or activities while not taxing

similar private property and activities. However, an elementary constitutional principle, repeated in each of the "State taxing" cases, is that Congress cannot tax state property or activities which are unique to State government and essential to its preservation. E.g., Wilmette Park District v. Campbell, 338 U.S. 411 (1949); New York v. United States, supra, 326 U.S. 572; Allen v. Regents of the University System, 304 U.S. 439 (1938); Helvering v. Gerhardt, 304 U.S. 405 (1938); South Carolina v. United States, supra, 199 U.S. 437, 461 (1905).

A leading constitutional law scholar, Bernard Schwartz, has observed that the doctrines of the "State taxing" cases apply to other fields of congressional regulation as well.

> What is true of the state immunity from federal taxation is also true of state immunity from federal regulation. A federal regulatory law presumably could not operate to curtail the exercise by a state of its essential government functions. On the other hand, where a state engages an activity not uniquely governmental, it can be subjected to any federal law that controls such activity.
> I Schwartz, A Commentary on the Constitution of the United States, § 22 at page 70 (1963).

The activity of compensating its officers, employees and other public officials is certainly unique to a State government. No private business pays the salary of public officials. There are no Governors, Legislators, Legislative Aides, Highway Patrolmen or State Troopers, Judges, Hearing Officers, Administrative Boards or Commissioners, Driver's License Examiners, Deputy Attorneys General, Tax Collectors, or Court Clerks in the private sector of the economy.

The ability to recruit and retain such employees and pay them what it deems to be a fair wage is an activity essential to a State's preservation. Such a regulation as the wage ceiling imposed by the Economic Stabilization Act of 1970, as amended, is certainly a measure which unduly interferes with and substantially burdens State activities. The running of a State and paying fair salaries to its officials and employees are activities quite different from operating a railroad (United States v. California, 297 U.S. 175 (1936)), selling timber on school lands (Case v. Bowles, 327 U.S. 92 (1946)), or operating schools and hospitals (Maryland v. Wirtz, supra, 392 U.S. 183). These cases simply do not, and can not, stand for the proposition that unique governmental activities of States, essential to their preservation, can be regulated and controlled by the Federal Government. The constitutional principle of Federalism inherent in the Tenth Amendment must be reaffirmed and the inherent sovereignty of the fifty States acknowledged.

B. Congress did not Intend Salaries of State Employees to be Subject to the Economic Stabilization Act of 1970

The Congress of the United States did not grant to the President or to any federal administrative body the authority to regulate or control the internal affairs of the sovereign States, especially in the area of setting salaries for the employees of a State. Nothing contained in the Economic Stabilization Act indicates an intent on the part of the Congress to confer such a power on the Executive Branch.

Section 203(a)(1) of the Act delegates certain powers to the President, including the authority to "stabilize prices, rents, wages, and salaries . . . ." However, no mention is made of the

States of the Union in this grant of authority, nor can their inclusion be readily implied. Such an omission is quite significant for subsection (h) of that section provides as follows:

> No state or portion thereof shall be exempted from any application of this title with respect to rents solely by virtue of the fact that it regulates rents by State or local law, regulation or policy.

Congress apparently felt that explicit mention of States was necessary to make clear the coverage of the Act with respect to rent stabilization; however, no such clear expression is included with respect to the control of wages. Hence, if Congress had intended to include salaries paid employees by the sovereign States, it would have explicitly mentioned or clearly referred to the States in section 203(a)(1).

The settled, long established rule is that an unexpressed purpose of Congress to set aside State regulation of its internal affairs is not lightly to be inferred. E.g., California v. Zook, 336 U.S. 725, 733 (1949); Penn Dairies v. Milk Control Commission, 318 U.S. 261, 275-76 (1943); Parker v. Brown, 317 U.S. 341, 351 (1943); Coan v. California, supra, ___ Cal.3d ___ (1974). See also United States v. Mine Workers, 330 U.S. 258, 272 (1947) ("[S]tatutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."). This principle was reaffirmed just last term in Employees of Dept. of Public Health and Welfare v. Missouri, 411 U.S. 279, 284-85 (1973). This rule applies "with even greater force when an administrative tribunal is claiming a state is subject to its jurisdiction so that it may totally or partially invalidate state laws."

Coan v. California, supra, ___ Cal.3d ___ (1974) (Slip opinion, page 11).

This Court has long recognized the need to exercise the greatest restraint in construing congressional statutes which undertake to exercise powers traditionally exercised by the States.

> An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication,[citations] should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation. . . . Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Penn Dairies v. Milk Control Commission, supra, 318 U.S. at 275.

The principle which emerges is that "Congressional purposes to displace local laws must be clearly manifested." California v. Zook, supra, 336 U.S. at 733. See also Conn. Light and Power Co. v. Power Commission, 324 U.S. 515, 532 (1945); Maurer v. Hamilton, 309 U.S. 598, 614 (1940); Kelly v. Washington, 302 U.S. 1, 11, 14 (1937); Mintz v. Baldwin, 289 U.S. 346 (1933); Coan v. California, supra, ___ Cal.3d ___ (1974). The need for such restraint has been particularly apparent when the activity sought to be regulated by the federal authorities is an activity of the State itself. As this Court has noted, "an unexpressed purpose to nullify a state's control over its officers and agents is

not lightly to be attributed to Congress. . . ." Parker v. Brown, supra, 317 U.S. at 351.

The above rules have two general exceptions which permit resort to rules of construction or extrinsic matters such as legislative history. However, these exceptions are inapplicable to the instant matter. The first covers regulation of the proprietary activities of the States. See United States v. California, 297 U.S. 175, 186 (1936); 3 Sutherland, Statutory Construction (3rd ed., Horock ed. 1943) § 6302, page 193. As noted in Argument I A, supra, the regulation in question concerns a strictly governmental function -- the compensation of employees engaged in purely governmental activities. Coan v. California, supra, ___ Cal.3d ___ (Slip opinion, page 11).

The second exception concerns those regulations the objectives of which could not be accomplished without including State governments. See California v. United States, 320 U.S. 577, 585-586 (1944); 3 Sutherland, Statutory Construction, supra, § 6302, page 193. The control of state employee salaries is not essential to the statute's purpose of controlling inflation since such salaries are based on prevailing rates in other sectors of the economy and control of these other sectors automatically limits state salaries. Coan v. California, supra, ___ Cal.3d ___ (Slip opinion, pages 11-12); See Argument I D, infra.6/

6/ Since neither of the foregoing two exceptions is applicable to the instant case, the Temporary Emergency Court's reliance on United States v. California, supra, 297 U.S. 175, is misplaced. Also, since the Act is clear on its face, the Court's heavy reliance on legislative history is improper. See Coan v. California, supra, ___ Cal.3d ___ (Slip opinion, page 13).

The Temporary Emergency Court of Appeals purported to dispose of the statutory interpretation question by asserting that such an argument was rejected in Case v. Bowles, supra, 327 U.S. 92; United States v. Ohio, supra, 487 F.2d at 939. Such an assertion is incorrect. Bowles held that explicit mention of "states" need not be included in a congressional enactment before that act can be applied to the States. However, in Bowles, this Court made it clear that before an act can be applied to the internal affairs of sovereign States, there must be some reference in the act from which the alleged congressional intent can be inferred. The Temporary Emergency Court of Appeals found and discussed no such reference in the Economic Stabilization Act of 1970, as amended. In Bowles the act in question (Emergency Price Control Act of 1942) contained language making the act applicable to "the United States or any agency thereof, or any other government, or any of its political subdivisions or any agency of any of the foregoing." 327 U.S. at 99. No similar language is contained in the Economic Stabilization Act of 1970, as amended. Case v. Bowles, supra, actually supports the argument of defendants. Bowles quite clearly holds that in the absence of a clear expression of intent on the part of Congress, federal legislation will not be deemed to have intended to set aside statutes of the States regulating their internal affairs. Furthermore, the Court below failed to recognize and deal with the latest expression of this Court on this subject. Employees of the Dept. of Public Health and Welfare v. Missouri, 411 U.S. 279.

It follows that since Congress did not clearly manifest its intent to apply the Economic Stabilization Act of 1970, as amended, to the several States, the Act should be held to be inapplicable to the State of Ohio.

C. Even if Congress Did Intend that State Employees' Salaries Should be Regulated, the Delegation of this Power to the President Under the Vague Standards of the Economic Stabilization Act was Improper

The concern over excessive delegation of legislative functions to the Executive Branch stems from the doctrine of Separation of Powers.

> The Constitution, in distributing the powers of government, creates three distinct and separate departments - the legislative, the executive and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital [citation omitted] , namely, to preclude a commingling of these essentially different powers of government in the same hands.
> O'Donoghue v. United States, 289 U.S. 516, 530 (1933).

The aim of our theory of government is "to preserve the liberties of the people from excessive concentration of authority." United Public Workers v. Mitchell, 330 U.S. 75, 91 (1947).

It is not asserted that the Congress may never delegate its power to the Executive Branch. The practicalities of government demand that many vital powers of Congress be entrusted to the Executive under extremely broad grants of legislative power. See, e.g., Lichter v. United States, 334 U.S. 742 (1948); National Broadcasting Company v. United States, 319 U.S. 190 (1943); Federal Radio Commission v. Nelson Brothers, 289 U.S. 266 (1933). Such broad delegations will normally be upheld so long as Congress provides some reasonable standards to guide the Executive in his exercise of the granted powers.

See United States v. Rock Royal Co-op, 307 U.S. 533 (1930); Hampton v. United States, 276 U.S. 394 (1928).

This Court has upheld broad grants of powers to the Executive with respect to economic controls on the private sector. The proper standard for delegation is whether the legislation ". . . sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will." Yakus v. United States, 321 U.S. 414, 425 (1944). See also Amalgamated Meat Cutters and Butcher Workmen v. Connally, 337 F.Supp. 737 (D.D.C. 1971).

The instant case does not concern the standards to be applied in the economic regulation of the private sector. It may very well be that the broad standards of delegation allowed in Yakus and Amalgamated Meat Cutters may be wholly appropriate for the private sector, yet be wholly inappropriate when applied to the States, especially where, as here, the boundaries of the field have not been clearly marked.

The Congress does not have unlimited powers of delegation. This Court has recognized that there are some circumstances under which a congressional delegation may be too broad. A.L.A. Schechter Poultry Corp. v. United States, supra, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). In a subsequent opinion, this Court noted that these two cases "dealt with delegation of power . . . to devise novel rules of law in a field in which there had been no settled law or custom." Fahey v. Mallonee, 332 U.S. 245, 249 (1947). It is submitted that for much the same reason, the delegation involved in this case should be found invalid.

To leave the decision of whether or not to regulate State government pay practices wholly in the hands of federal administrators acting under an extremely general grant of congressional power comes dangerously close to the runaway executive power involved in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). To allow an administrative agency to take over such important fiscal control of the States under a general grant of regulatory power is to rob the States of the sovereignty guaranteed them by the Tenth Amendment to the United States Constitution.

D. THERE IS NO RATIONAL BASIS FOR THE REGULATION OF STATE EMPLOYEES' SALARIES BY DIRECT FEDERAL CONTROL WHICH WOULD PERMIT SUCH ACTION IN VIEW OF THE TENTH AMENDMENT

1. Exercises of Power Under the Commerce Clause Must Meet the Standards of Due Process

Assuming, *arguendo*, that the regulation of state employees' salaries is a valid exercise of congressional authority under the Commerce Clause, the limitations on federal power inherent in the Tenth Amendment demand that such exercise be subject to the requirements of Due Process. Since federal action which fails to comply with the requirements of Due Process is not a power "delegated to the United States by the Constitution," such action vis a vis a State and its citizens not only violates Due Process of law guaranteed by the Fifth Amendment, but also contravenes the Tenth Amendment to the United States Constitution.

In speaking of the power of Congress under the Commerce Clause, this Court has stated the following: "All agree . . . that this power must

be exercised in subjection to the guaranty of due process of law found in the Fifth Amendment [citations omitted]." Railroad Retirement Board v. Alton R. Company, 295 U.S. 330, 347 (1935). More recently, this Court, speaking through Mr. Justice Frankfurter, reaffirmed this principle when it said, " . . . not even resort to the Commerce Clause can defy the standards of due process." Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 616 (1950).

Ordinarily, due process is satisfied if there is some rational basis for the legislation, United States v. Carolene Products Co., 304 U.S. 144, 152 (1938), or if "the means selected shall have a real and substantial relation to the object sought to be attained." Nebbia v. New York 7/, 291 U.S. 502, 525 (1934). Beyond this, the Court has indicated that in proper cases "the existence of facts supporting the legislative judgment is to be presumed," United States v. Carolene Products Co., supra, at 152, or that it is enough that the "legislature might have concluded" that such facts existed, Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 487 (1955).

However, such presumptions operate only when other important constitutional interests are not involved. For example, in United States v. Carolene Products Co., supra, this Court cautioned:

7/ The Nebbia case involved a state statute under the Due Process Clause of the Fourteenth Amendment. However, this Court has stated: "The restraint imposed upon legislation by the due process clauses of the two amendments is the same." Heiner v. Donnan, 285 U.S. 312, 326 (1932).

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . ."
>
> United States v. Carolene Products Co., supra, at 152, fn. 4.

While the examples cited by the Court in that case generally involved First Amendment guarantees, there is no less a need for protection of Petitioners' fundamental right to be free of unconstitutional exercises of power by the Congress as guaranteed by the Tenth Amendment.

It is crucial to Petitioners that this Court decide whether Due Process has been satisfied in this case. Amicus Curiae is mindful of the Court's admonition that it does not "sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." Day-Brite Lighting v. Missouri, 342 U.S. 421, 423 (1952). However, where, as in this case, the federal government has attempted to usurp the role as arbiter of a sovereign State's relations with its employees, it is well to remember the admonition of an earlier court that the Due Process Clause "is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law', by its mere will." Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272, 276 (1855).

With regard to the proper scope of review which should be afforded, this Court has recognized that in appropriate cases it may take judicial notice of external facts by which it may better test the

constitutionality of a statute. Muller v. Oregon, 208 U.S. 412 (1908); Mugler v. Kansas, 123 U.S. 623 (1887). In United States v. Carolene Products Co., supra, 304 U.S. at 153-54, this Court noted the following:

> . . . we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without reason for the prohibition. . . .

The regulation of state employees' salaries is wholly without rational support in fact, and is of that class of legislation which should be barred by the Due Process Clause of the Fifth Amendment and the Tenth Amendment.

2. There is No Rational Basis for the Inclusion of State Employees in the Wage Controls of the Economic Stabilization Act of 1970

There is little question that salary setting in the public sector is guided by principles different from those of the private sector.

> Public employment may or may not be different from private employment in some respects, but formal pay determination systems tend to reflect recognition of some special characteristics of public sector employment. Several of the factors which are widely cited as responsible for the difference in approach to pay setting are: (1) Government is a monopolist in many of its functions, but this is so because the activities are so

unprofitable that they do not attract private entrepreneurs; (2) Consumers are required to pay for most government services, but the price (taxes) is subject to political acceptability; (3) In spite of the constraints of the revenue system, the government employer normally must compete with private employers for labor; (4) Because of the nature of public service, the right of government employees to exert power in their own economic self interest has been restricted; (5) As public employees are denied the rights granted private sector employees under the National Labor Relations Act, it is the government's (public's) moral responsibility to guarantee that its employees are treated no less fairly than they would be in alternative employment; (6) Many jobs are so special to government that conditions in the competitive labor market need not be considered in pay setting past the entry grade; on the other hand, people do not enter such occupations solely on the basis of beginning pay, but on their assessment of the job's rewards over a work lifetime.

An effort has been made by governments to compromise the conflicts apparent in these factors and to produce a system which is both equitable and acceptable. The result has been that unlike the situation in private industry, pay determination in most public agencies has involved adoption of a formal pay policy or principle and establishedment of a set of procedures for attaining the stated pay goal. One or both is usually embodied in law.

* * *

. . . by far the most common principle, calls for pay set by "fair comparison" with the private sector (or other public agencies, or both) on a job-by-job basis. It envisages payment of neither too much nor too little, with the result that the government can attract and retain qualified employees without excessively burdening the taxpayer or competing unfairly with private business. The concept embodies what might be termed the maximization of equity. In fact, the standard of fairness involved had proven widely acceptable to all affected groups -- taxpayers, public employees and their organizations, public administrators, and private industry.

B. V. H. Schneider, "Prevailing Rates in California; A Symposium," California Public Employee Relations, Institute of Industrial Relations, University of California, Berkeley, CPER Series No. 9 (June 1971), pages 6-7. [Hereinafter cited as "Schneider, 'Prevailing Rates.'"]

The State of Ohio utilizes a formalized statutory method for arriving at equitable salary rates for its employees. The responsibility for setting state salaries is delegated to the State Employee Compensation Board. Page's Ohio Revised Code Annotated, section 143.101 (Anderson 1972) sets forth the standards to be used in setting public employee salaries:

In making its decisions, the [State Employee Compensation] board shall be guided by comparative salary data, recruitment problems, separation rates,

> and other conditions affecting employment in the positions under consideration.

California law is substantially the same.[8]

Under the California system, which is similar to that of Ohio, the California State Personnel Board begins collecting salary information from private industry and governmental agencies through surveys conducted in the fall. The information from the fall surveys serves as a basis for the Board's salary fund recommendations which are transmitted to the Governor and the Legislature in December. While an attempt is made to forecast what the status of state salaries will be by July of the following year, state employees' salaries still lag anywhere from three to fifteen months during the course of the fiscal year. As a result of this salary setting method, state salaries rarely set the pace for salary standards in the economy as a whole. The conclusion that public employees are rarely salary trend setters is supported in theory as well as practice.

The "model employer" principle, <u>popular in the 19th century, but rarely supported now</u>, holds that pay should exceed the

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8/ California Government Code § 18850 provides, in part, as follows: "The board shall establish and adjust salary ranges for each class of position in the state civil service. The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities. In establishing or changing such ranges consideration shall be given to the prevailing rates for comparable service in other public employment and in private business.

> market rate by whatever is necessary to attract the elite of the group, on the theory that a civil service should employ the most efficient and gifted workforce possible. The argument against this position is that the government should not use its monopoly position in unfair competition with private business. [Emphasis added.] Schneider, "Prevailing Rates," page 7.

Not only does the salary setting method employed by States prevent state salaries from becoming salary trend setters, it automatically reflects controls placed on the private sector. For example, at one time California took the cost of living directly into account in its salary setting practices. From 1945 to 1949, California Government Code section 18850 provided that:

> . . . consideration shall be given to the prevailing rate for comparable service in other public employment and in private business, improvement of living standards, <u>the current costs of living</u>, and the State's financial condition. [Emphasis added.]

It was soon noted that such a procedure was not necessary under a system based on prevailing rates, and the cost of living was dropped from section 18850. As a special legislative committee found:

> In discussing such factors as cost of living and the improvement of standards of living, we suggested that there were other ways of taking them into account than by establishing them directly as factors to be observed by the Personnel Board. By this we meant simply that if

> the state salaries are based on a consideration of outside rates, then all of these other factors will automatically be taken into account, since it must be assumed that the salaries in private enterprise in the State will generally be kept abreast of changing costs in living and will represent the degree of advancement in living standards which the tax payers of the State can afford to provide for their public servants. "State Salary Policies and Practices," Report of the Assembly Interim Committee on Governmental Efficiency and Economy (Sacramento: February 1953), page 11.

The current policy of California regarding the cost of living has been stated by the California State Personnel Board as follows:

> Such factors as "cost of-living" and "standard of living" are not among the specific standards applied directly in setting State salaries. However, the effect of these factors is present in State salaries because State salaries are based on prevailing rates. Changes in the cost of living, for example, often influence salaries paid in private industry. Consequently, the prevailing rate data used by the State indirectly reflects the cost-of-living factor. To attempt to consider cost of living directly in setting State salaries might result in paying twice for the same factor. [Emphasis added.] California State Personnel Board, Standards and Survey Division, Salary Setting in California State Civil Service (1969), supra, page 14.

State employees' salaries should not be subject to wage controls for the same reason. State employees' salaries are already controlled

indirectly by their being tied to the prevailing rate for the private sector. To impose additional direct controls would result in forcing state employees to "pay twice for the same factor" by having them bear a disproportionate burden of the government's attempt to fight inflation. State employees already bear a heavier burden during inflationary times.

> Inflation by its nature strikes different individuals and groups with highly discriminatory effect. The most nearly unrelieved victims, apart from those living on pensions or other fixed provision for personal security, are those who work for the state. In the private economy the firm which sells goods has, in general, an immediate accommodation to the inflationary movement. Its price increases are the inflation. The incomes of its owners and proprietors are automatically accommodated to the upward movement. To the extent that wage increases are part of the inflationary process, this is also true of organized industrial workers. Even unorganized white collar workers are in a milieu where prices and incomes are moving up. The adaption of their incomes, if less rapid than that of industrial workers, is still reasonably prompt.
>
> The position of the public employee is at the other extreme. His pay scales are highly formalized, and traditionally they have been subject to revision only at lengthy intervals. In states and localities inflation does not automatically bring added revenues to pay higher salaries and incomes. Pay revision for all public workers is subject to the temptation to wait and see if the

inflation isn't coming to an end. There will be some fear -- this seems to have been more of a factor in England than in the United States -- that advances in public wages will set a bad example for private employers and unions.

Inflation means that employment is pressing on the labor supply and that private wage and salary incomes are rising. Thus the opportunities for moving from public to private employment are especially favorable. Public employment, moreover, once had as a principal attraction a high measure of social security. Industrial workers were subject to the formidable threat of unemployment during depression. Public employees were comparatively secure, and this security was worth an adverse salary differential. But with improving economic security this advantage has diminished. Private employment thus has come to provide better protection against inflation and little worse protection against other hazards. <u>Though the dedicated may stay in public posts, the alert go.</u>
John Kenneth Galbraith, <u>The Affluent Society</u> (Houghton Mifflin Co., 1960), pages 264-66. [Emphasis added.]

The practical effect of Professor Galbraith's thesis can best be seen by comparing the recent history of State salary rates in comparison to those of comparable employers in the private sector. Using the State of California as an example, Table 1 demonstrates how public employees have in recent years found their salary increases to be less than the amounts agreed to in collective bargaining settlements.

TABLE 1

Comparison of Increases in Salaries Reflected by Collective Bargaining Settlements with Increases in State of California Salaries

	1968	1969	1970	1971	1972	1973	Simple Cov.	Compound Average
Private Industry Collective Bargaining Settlements (1)	6.5	9.3	14.9	13.2	11.0	6.2	61.1	78.5
State of California Salary Increases	5.7	5.6	5.2	0	8.4	7.7	32.6	37.1

(1) Over the life of contract wage rate changes in nonmanufacturing private industry exclusive of construction where settlements affected 1,000 workers or more, annual periods ending June 30 of each year.

Source: State of California Department of Finance; U.S. Department of Labor, Bureau of Labor Statistics, Current Wage Developments.

Given these figures, to ask State employees to shoulder the burden of economic controls to fight inflation when they are already the ones who suffer the most in inflationary times is patently unfair.

In summary, State employees' salaries are often already regulated by a complex statutory scheme which automatically reflects conditions in the economy. This means that both inflation and wage controls to combat inflation are already parts of the salary setting mechanism. As can be seen by the statistical figures above, State employees' salaries have, if anything, lagged behind the rest of the economy and should be the last to be controlled. The imposition of wage controls in the context of this formalized system of salary setting is wholly without rational basis and should be struck down as a violation of Due Process. Since the federal regulatory scheme as applied to the States violates the principles of Due Process, the Tenth Amendment precludes its application to the States in general and the State of Ohio in particular.

CONCLUSION

For the foregoing reasons, the decision of the Temporary Emergency Court of Appeals should be reversed.

Respectfully submitted,

Loren E. McMaster
Attorney for Amicus Curiae
California State Employees'
Association

APPENDIX A

Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 (Supp. II, 1972)

§ 202. Findings

It is hereby determined that in order to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar, it is necessary to stabilize prices, rents, wages, salaries, dividends, and interest. The adjustments necessary to carry out this program require prompt judgments and actions by the executive branch of the Government. The President is in a position to implement promptly and effectively the program authorized by this title.

§ 203. Presidential authority

(a) The President is authorized to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to--

(1) stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970, except that prices may be stabilized at levels below those prevailing on such date if it is necessary to eliminate windfall profits or if it is otherwise necessary to carry out the purposes of this title;

(b) In carrying out the authority vested in him by subsection (a), the President shall issue standards to serve as a guide for determining levels of wages, salaries, prices, rents, interest rates, corporate dividends, and similar transfers which are consistent with the purposes of this title and orderly economic growth. Such standards shall--

(h) No State or portion thereof shall be exempted from any application of this title with respect to rents solely by virtue of the fact that it regulates rents by State or local law, regulation or policy.

APPENDIX B

Office of the Solicitor General
Washington, D.C. 20530

March 6, 1974

Loren E. McMaster, Esq.
California State Employees' Association
1108 "O" Street
Sacramento, Calif. 95814

Re: Fry v. United States (No. 73-822)

Dear Mr. McMaster:

As requested in your letter of February 20, 1974, I consent to the filing in the above case of a brief amicus curiae by the California State Employees' Association.

In your letter you also request consent to the filing of such a brief in the companion case of Ohio v. United States (No. 73-839). The Court, however, has not acted upon the petition in this case, but granted only the petition in Fry. I accordingly assume that you wish to file an amicus brief only in the Fry case.

Sincerely,

Robert H. Bork

Robert H. Bork
Solicitor General

cc: John A. Brown, Esq.
Lucas, Prendergast, Albright,
Gibson, Brown & Newman
42 East Gay Street
Columbus, Ohio 43215

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-822

Ernest Fry and Thelma Boehm,

Petitioners,

vs.

United States of America,

Respondent.

CONSENT TO FILE AMICUS CURIAE BRIEF

Ernest Fry and Thelma Boehm, the petitioners in the above-entitled case, having been requested by Loren E. McMaster, Senior Attorney, California State Employees' Association, to consent for the said Loren E. McMaster, Senior Attorney, California State Employees' Association, to file a brief amicus curiae, hereby consents to the filing of said brief.

DATED: 2/27/74

John A. Brown

JOHN A. BROWN
Lucas, Prendergast, Albright, Gibson,
Brown and Newman
Attorney for Petitioners